Supreme Court, U.S.
FILED
NOV 28 1995
CLERK

No. 95-669

In The

Supreme Court of the United States

October Term, 1995

AMERICAN CYANAMID COMPANY,

Petitioner,

vs.

JOHN L. GORTON, THOMAS HAUCH, TIMOTHY HAUCH AND MICHAEL VANDER LEEST, PARTNERS UNDER THE NAME GORTON FARMS,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT H. BICHLER
Counsel of Record
JOANNE M. BREESE-JAECK
HOSTAK, HENZL & BICHLER, S.C.
Attorneys for Respondents
840 Lake Avenue, Third Floor
Racine, Wisconsin 53403
(414) 632-7541

BEST AVAILABLE COPY

7840
Lutz Appellate Services, Inc.
(800) 5 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

17 pp

QUESTIONS PRESENTED

I. Is this petition timely and within the jurisdiction of the Court since it does not raise the federal issue (federal preemption) upon which the petition (and presumably the order) for extension of time was based? (If technically within the Court's jurisdiction should the petition be summarily denied because there was a lack of candor employed in obtaining an extension of time and an expansion of the jurisdiction of this Court?)

II. Can petitioner raise in this court questions regarding the Seventh Amendment's guarantee of a jury trial and regarding the Fourteenth Amendment's Due Process Clause which questions were neither raised nor passed upon in any court below?

III. Is there a constitutional right to a jury trial regarding an issue of costs to be awarded to the prevailing party in litigation or regarding a factual issue which a court finds has been established as a matter of law and regarding which a jury rendered a verdict?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Statement of Jurisdiction	1
Statement of the Case	2
Reasons for Denying the Writ	4
I. This petition is not timely and not within the jurisdiction of the Court since it does not raise the federal issue (federal preemption) upon which the petition (and presumably the order) for extension of time was based. (If technically within this Court's jurisdiction this petition should be summarily denied because of lack of candor employed in obtaining an extension of time and expansion of the jurisdiction of this Court.)	4
II. The petition must be denied because it raises in this Court questions regarding the Seventh Amendment's guarantee of a jury and regarding the Fourteenth Amendment's Due Process Clause which questions were neither raised nor passed upon in any court below.	7
III. There is no constitutional right to a jury trial regarding an issue of costs to be awarded to the prevailing party in litigation nor regarding a	

Contents

	Page
factual issue which a court finds has been established as a matter of law and regarding which the jury rendered a verdict.	8
Conclusion	11

TABLE OF CITATIONS

Cases Cited:

Alyeska Pipeline Serv. v. Wilderness Soc., 421 U.S. 240 (1975)	9
Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988)	7
Clark v. Jeter, 486 U.S. 456 (1988)	7
Curtis v. Loether, 415 U.S. 189 (1974)	9
FCC v. League of Women Voters of California, 468 U.S. 364 (1984)	9
Fiumefreddo v. McLean, 174 Wis. 2d 10, 496 N.W. 2d 226 (Ct. App. 1993)	2
Galloway v. United States of America, 319 U.S. 372 (1943)	10, 11
Hutto v. Finney, 437 U.S. 678 (1978)	9
Illinois v. Gates, 463 U.S. 213 (1983)	8

Contents

	Page
Jenkins v. Amchem Products, Inc., 886 P.2d 869 (Kan. 1994), *petition for cert. filed*, 63 U.S.L.W. 3908 (U.S. June 16, 1995) (No. 94-2061)	6
Kleem v. Immigration & Nat. Serv., 479 U.S. 1308 (1986)	6
Missouri v. Jenkins, 495 U.S. 33 (1990)	4
Sprague v. Ticonic National Bank, 307 U.S. 161 (1939)	9
Yee v. Escondido, 503 U.S. 519 (1992)	8
Statutes Cited:	
7 U.S.C. § 136-136y (1994)	1
28 U.S.C. § 1257	8
28 U.S.C. § 1257(a)	5
28 U.S.C.S. § 2101(c)	4, 6
Wis. Stat. § 100.18	3, 4, 7, 10, 11
Wis. Stat. § 100.18(11)(b)(2)	8
United States Constitution Cited:	
Seventh Amendment	i, ii, 4, 5, 6, 7, 9, 11

Contents

	Page
Fourteenth Amendment	i, ii, 3, 4, 5, 6, 7
Rules Cited:	
Sup. Ct. R. 13(2)	5
Sup. Ct. R. 13(5)	5

STATEMENT OF JURISDICTION

Respondents contend that this petition is not timely, and, therefore, is not within the jurisdiction of this court. The application for extension of time (and presumably the order which extended the time) had but one federal issue as its basis, which was whether the Wisconsin Supreme Court erred regarding federal preemption.

In its petition for an extension of time Cyanamid stated its purpose: "The state supreme court's ruling that FIFRA (Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. sec. 136-136y (1994)) does not preempt state law damage claims based on advertising and promotional representations that are completely consistent with a pesticide's EPA-approved labeling directly conflict with opinions of a least two federal courts of appeals."

Since the application for extension of time was based on whether Wisconsin erred regarding federal preemption, presumably the order extending time is limited to a petition for certiorari which raises federal preemption. This petition for certiorari does not seek review of the federal preemption issue. Rather, the petition attempts to raise (for the first time) totally new alleged federal issues. This petition is not timely. It is not within the jurisdiction of this Court.

(If we assume for purposes of argument only that Cyanamid's petition is technically within the jurisdiction of this Court, then the jurisdiction was obtained through a lack of candor with the court. In asking for more time, Cyanamid stated that it needed more time to assess whether it would petition to be heard regarding federal preemption. However, the petition which was filed does not seek review of that issue. At best, any claim to this Court's jurisdiction was obtained through use of lack of candor

with the Court. Under these circumstances, the Court should summarily deny this petition. To do anything less would appear to condone being less than totally candid with this Court.)

STATEMENT OF THE CASE

The record on appeal does not include a complete transcript of the trial court proceedings. Not all of the evidence admitted at trial is in the appellate record. The exhibits admitted at trial are not part of the appellate record. The positions of trial counsel regarding jury instructions and requested verdict are not part of the appellate record. In Wisconsin it is the appellant's responsibility to assure the record is complete. Where the record is incomplete, it is assumed that the missing material supports the trial court's ruling. *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 27, 496 N.W. 2d 226 (Ct. App. 1993). In assessing this petition, this Court must assume, as did the Wisconsin Supreme Court, that the missing materials support the trial court rulings.

Some of the statements made in the petition are false and others are misleading. Neither attorney who has taken part in the preparation of the petition took part in this litigation while it was in the trial court. The fact that no complete transcript of the trial court proceedings has ever been prepared may provide an explanation for the false and misleading assertions in the petition. Under this Court's rules it is incumbent on respondents to address any perceived misstatement of fact or law in the petition.

False and misleading is the statement made at page 5 of the petition: "The trial centered on the tests conducted by Cyanamid to determine a safe waiting period for planting rotational corn in soybean fields that had been treated with Scepter."

The truth is that the trial centered on what Cyanamid reported to farmers about the alleged safety of Scepter to follow

corn and what Cyanamid knew about Scepter's danger to follow corn. The internal records of Cyanamid showed that Scepter frequently damaged follow corn. In spite of having such information Cyanamid advertised Scepter as extremely safe to follow corn. In its advertising Cyanamid stated that field tests showed only one case of follow corn response to Scepter. Yet, Cyanamid's internal records documented many reports of corn response due to Scepter carryover. In fact, Cyanamid's documents showed that approximately 29% of tests showed Scepter carryover to follow corn.

The partial quotation in the first paragraph on page 6 of the petition tends to be misleading. As partially quoted, a reader gets the impression that in Wis. Stat. § 100.18 reasonable attorney fees are part of the pecuniary loss, *i.e.*, the damage element of the cause of action. The statute clearly states that reasonable attorney fees are part of "costs" allowed to the successful litigant. In the context of this petition (in which rights to a jury trial and rights to due process have been made) a clear distinction between what is the damage element of a cause of action verses what is an element of "costs" recoverable by a successful litigant is essential to the analysis. At best the partial quote made in the first paragraph appears designed to mislead.

Also, potentially misleading is the assertion made at the bottom of page 8 and the top of page 9 where the implication is that in the Wisconsin Supreme Court, Cyanamid claimed a deprivation of due process. In the Wisconsin Supreme Court Cyanamid did not make any such argument. The Wisconsin Supreme Court did not address or decide any such issue. *A fortiori* no argument was made nor did the Wisconsin Supreme Court address the due process requirements of the Fourteenth Amendment.

Cyanamid's petition for the first time raises issues under the

Seventh and the Fourteenth Amendments of the United States Constitution. In the more than six year course of this litigation at no time before this petition for certiorari did Cyanamid ever press any Seventh or Fourteenth Amendment issues. Similarly, no court below ever addressed or decided any issues relating to the Seventh Amendment or relating to the Fourteenth Amendment. While it is true that Cyanamid did argue that it was entitled to have a jury decide whether it had violated § 100.18 of the Wisconsin Statutes, Cyanamid never argued nor did any court below ever address whether any rights under the Seventh or the Fourteenth Amendments of the United States Constitution were involved in this case.

REASONS FOR DENYING THE WRIT

I.

THIS PETITION IS NOT TIMELY AND NOT WITHIN THE JURISDICTION OF THE COURT SINCE IT DOES NOT RAISE THE FEDERAL ISSUE (FEDERAL PREEMPTION) UPON WHICH THE PETITION (AND PRESUMABLY THE ORDER) FOR EXTENSION OF TIME WAS BASED. (IF TECHNICALLY WITHIN THIS COURT'S JURISDICTION THIS PETITION SHOULD BE SUMMARILY DENIED BECAUSE OF LACK OF CANDOR EMPLOYED IN OBTAINING AN EXTENSION OF TIME AND AN EXPANSION OF THE JURISDICTION OF THIS COURT.)

"Title § 2101(c) [28 USC § 2101(c)] requires that a petition for certiorari in a civil case be filed within 90 days of the entry of the judgment below. This 90-day limit is mandatory and jurisdictional." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). In keeping with this mandate, the Supreme Court has directed that the clerk will not file any petition for a writ of certiorari that is

jurisdictionally out of time. Sup. Ct. R. 13(2). This rule is designed to keep the clerk from filing cases over which the Court does not have jurisdiction. This case was filed because on the face of the record it appears to be timely, but in reality it is not timely.

The Wisconsin Supreme Court issued its decision in this matter on June 26, 1995. On September 8, 1995, Cyanamid filed an application to extend the time for applying for a writ of certiorari. Cyanamid's request was made pursuant to Rule 13(5) of the Rules of the Supreme Court of the United States, which require that "[a]n application to extend the time to file shall set out the basis for jurisdiction in this Court . . . and set out specific reasons why an extension of time is justified . . . ."

Cyanamid's application generally states that the grounds for jurisdiction lie in 28 U.S.C. § 1257(a) (1988). This assertion is elaborated upon in the Statement of the Reasons Why an Extension of Time Is Justified. Specifically, Cyanamid argues that the "state supreme court's ruling that FIFRA does not preempt state law damages claims based on advertising and promotional representations that are completely consistent with a pesticide's EPA-approved labeling directly conflicts with opinions of at least two federal courts of appeals."

Nowhere in the entire application did Cyanamid either state or imply that its requested extension was related in any way to Seventh or Fourteenth Amendment questions. Instead, every aspect of Cyanamid's application confirms that the sole issue for which an extension had been requested was that of FIFRA preemption.

The alleged conflict between the Wisconsin Supreme Court's decision and the opinions of two federal courts of appeals is completely unrelated to the issues now set forth. Similarly,

"[t]his Court's disposition of the certiorari petition in [*Jenkins v. Amchem Products, Inc.*, 886 P.2d 869 (Kan. 1994), *petition for cert. filed*, 63 U.S.L.W. 3908 (U.S. June 16, 1995) (No. 94-2061)]" has nothing to do with the Seventh and Fourteenth Amendment questions asserted in Cyanamid's petition.[1]

In short, Cyanamid failed to preserve the issues now raised by its Application to Extend Time since that application is limited to issues of FIFRA preemption. Its present petition was not filed within the ninety days which are statutorily allowed. *See* 28 U.S.C.S. § 2101(c) (1988). Therefore, Cyanamid's petition is jurisdictionally out of time, and this petition should be dismissed as not within the Court's jurisdiction.

By the time that Cyanamid requested an extension of time, its counsel had to know what issues might be raised with this Court. Thereafter, Cyanamid wisely chose not to raise the federal preemption issue. On its face the Wisconsin Supreme Court decision demonstrates that there can be no arguable merit to an assertion that FIFRA preempts claims based on fraudulent misrepresentation. From the perspective of these respondents, who to this day have not been paid for their 1988 and 1989 crop losses and who have had to endure years of litigation, this petition appears to be yet another use and manipulation by Cyanamid of

---

1. Additionally, the fact that Cyanamid had hired a new in-house attorney shortly before the Wisconsin Supreme Court's opinion was rendered is clearly an insufficient basis upon which to request an extension. *See Kleem v. Immigration & Nat. Serv.*, 479 U.S. 1308 (1986) (Stating that requests for extensions of time "are not favored," and that the "good cause shown" standard was not met by a desire for additional time to research constitutional issues because the same reason could be adduced in virtually all cases.") Therefore, even if this stated reason could be inferentially extended to include constitutional issues, it would not have been sufficient grounds upon which to grant the extension. Consequently, Cyanamid would have been required to file its petition in a timely manner even if it had actually requested an extension.

the courts to achieve delay and thereby to further burden those victims of Cyanamid's wrongdoing who resort to the courts to seek redress based on Cyanamid's wrongdoings.

II.

THE PETITION MUST BE DENIED BECAUSE IT RAISES IN THIS COURT QUESTIONS REGARDING THE SEVENTH AMENDMENT'S GUARANTEE OF A JURY AND REGARDING THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE WHICH QUESTIONS WERE NEITHER RAISED NOR PASSED UPON IN ANY COURT BELOW.

In the more than six year course of the litigation at no time before this petition for certiorari did Cyanamid ever raise (nor did any court ever rule upon) any of the questions presented by Cyanamid in its Petition for a Writ of Certiorari. The questions presented and the arguments made in the petition for certiorari to this Court were not presented by Cyanamid in the trial court. They were not ruled upon by the trial court. Those questions and arguments were not presented to the Wisconsin Supreme Court. They were not passed upon by the Wisconsin Supreme Court. While it is true that Cyanamid did argue that a jury should have determined whether there was a violation of § 100.18 of the Wisconsin Statutes, Cyanamid never argued and no court ever addressed whether the Seventh Amendment's guarantee of a jury trial bore on the issue. Neither was it ever argued nor did any court below pass on whether the Fourteenth Amendment's Due Process Clause in any way related to the assessment of fees.

It is the practice of this Court when reviewing decisions by state courts not to decide federal claims that were not "pressed or passed upon" below. *Bankers Life & Casualty Co. v. Crenshaw,* 486 U.S. 71, 79-80 (1988); *Clark v Jeter,* 486 U.S. 456 (1988).

"In reviewing the judgments of state courts under the jurisdictional grant of 28 USC sec. 1257, the Court has, with very rare exception, refused to consider petitioners' claims that were not raised or addressed below." *Illinois v Gates*, 463 U.S. 213, 218-220 (1983); *Yee v. Escondido*, 503 U.S. 519, 521 (1992).

Since none of the issues which are presented to this Court for consideration by Cyanamid's petition for a writ of certiorari were either pressed or passed upon in any court below, this petition must be denied.

III.

THERE IS NO CONSTITUTIONAL RIGHT TO A JURY TRIAL REGARDING AN ISSUE OF COSTS TO BE AWARDED TO THE PREVAILING PARTY IN LITIGATION NOR REGARDING A FACTUAL ISSUE WHICH A COURT FINDS HAS BEEN ESTABLISHED AS A MATTER OF LAW AND REGARDING WHICH THE JURY RENDERED A VERDICT.

All of the issues raised in Cyanamid's petition center upon the assertion that the company was somehow deprived of its right to a jury trial when the trial court assessed attorney's fees pursuant to Wis. Stat. § 100.18(11)(b)(2). Section 100.18(11)(b)(2) of the Wisconsin Statutes provides in pertinent part that:

> Any person suffering pecuniary loss because of a violation of this section by any other person may sue in any court of competent jurisdiction and shall recover such pecuniary loss, together with costs, including attorney fees.

It has long been recognized that an award of attorneys' fees

is "'uniquely separable from the cause of action' that is settled by a court's judgment on the merits." *FCC v. League of Women Voters of California,* 468 U.S. 364, 375 n. 10 (1984) (citation omitted). This recognition flows from the fact that attorneys' fees are a form of costs. *See Hutto v. Finney,* 437 U.S. 678, 697 n. 28 (1978) (Stating that some federal statutes define attorneys' fees as an element of costs, while others separate fees from other taxable costs); *see also, Alyeska Pipeline Serv. v. Wilderness Soc.,* 421 U.S. 240, 250 (1975) (Explaining that, historically, federal courts referred to the state rules governing awards of counsel fees, but that in 1842, Congress gave the Supreme Court authority to prescribe the items and amounts of costs which could be taxed in federal courts). Thus, in stating that it was denied the right to a jury trial on the award of attorneys' fees, Cyanamid is really asserting that juries, rather than courts, must award costs.

This clearly cannot be the case. At common law, costs (including attorneys' fees) were not an available form of relief. *See Alyeska,* 421 U.S. at 247. Federal and state legislatures have defined those instances in which fee awards are available through statutory enactments. *See id.* at 240-263. Furthermore, attorneys fees have been recognized as falling within the historic equity jurisdiction of federal courts. *Sprague v. Ticonic National Bank,* 307 U.S. 161, 164 (1939).

The Seventh Amendment's guaranteed right to a jury trial does not encompass rights and remedies in equity. Rather, it is limited to common law actions in which *legal* rights are being ascertained. *See Curtis v. Loether,* 415 U. S. 189, 193 (1974).

There is no question that attorneys' fees fall outside of this definition. Consequently, it is completely meritless to assert that any Seventh Amendment violation could have occurred in this case. The trial court acted within its recognized scope of authority (and, in fact, followed its statutory mandate) by awarding fees to

the plaintiffs who had been harmed by Cyanamid's violation of Wis. Stat. § 100.18.

Furthermore, Cyanamid cannot argue that it was somehow deprived of a jury trial with respect to the determination of whether an underlying violation of Wis. Stat. § 100.18 had occurred to mandate a fee award. Throughout the two week trial in this case, Gorton Farms litigated their belief that misleading and deceptive information had been disseminated to them regarding Scepter. (Petitioner's App. B at 2b-5b). The jury heard a multitude of evidence, and entered a verdict finding negligence.

As stated by the trial court, the only reasonable interpretation of this verdict is that the jury did find that the information disseminated by Cyanamid was deceptive and misleading. (Petitioner's App. B at 4b). This constitutes a violation of Wis. Stat § 100.18. Because the verdict necessarily included a conclusion that Wis. Stat § 100.18 had been breached, Cyanamid did, in fact, receive a jury trial with respect to the underlying violation.

Moreover, even if the jury's verdict had not disposed of the underlying violation, the trial court was entitled to, and did, find noncompliance with § 100.18 as a matter of law. (Petitioner's App. B at 4b). The power of courts to rule as a matter of law has been accepted for well over a century. *See Galloway v. United States of America,* 319 U.S. 372, 389-90 (1943) (Stating that the contention that federal courts are constitutionally precluded from directing a verdict had been foreclosed for nearly a century as of 1943, and that the jury was not absolute master of fact in 1791).

In this case, undisputed evidence of misrepresentations was submitted for consideration. In assessing fees, the trial court found and counsel for Cyanamid admitted that the false and misleading information had been disseminated with the intent to

sell Scepter. This uncontroverted evidence constituted a violation of Wis. Stat § 100.18. (Petitioner's App. B at 2b-5b).

It was within the trial court's authority and was the trial court's duty to rule as a matter of law based upon the undisputed facts that a violation of § 100.18 of the Wisconsin Statutes had occurred. As shown by the analysis contained in *Galloway*, a trial court which so acts within its authority and which so performs its duty does not violate the Seventh Amendment. *See* 319 U.S. at 389-90.

CONCLUSION

The petition for certiorari should be dismissed because it is not within the jurisdiction of the Court. If it is within the jurisdiction, it should be denied both because the issues now raised were not pressed or passed on by any court below and because those issues are without factual basis and without legal merit.

Respectfully submitted,

ROBERT H. BICHLER
Counsel of Record
JOANNE M. BREESE-JAECK
HOSTAK, HENZL & BICHLER, S.C.
Attorneys for Respondents
840 Lake Avenue, Third Floor
Racine, WI 53403
(414) 632-7541